TING TIEN KWANG & ORS. v. KONG SUNG SENG & ORS.

[F.C. (Wylie C.J. (Borneo), Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) June 8, 1964]

[Kuching — Federal Court Civil Appeal No. 69 of 1963]

Partnership — Dissolution of — Dispute amongst partners — Trial judge exercising discretion on facts — Whether appellate court can review findings of trial court — Partnership Ordinance (Sarawak Cap. 67), ss. 14 and 24.

The appellants are 6 out of 17 partners in a partnership business which owns and runs a theatre at Sibu and some offices which are let out at rent. They being dissatisfied with the management of the partnership business commenced this action for dissolution of the partnership. They contended, *inter alia*, that (a) the respondents did not even consider the proposal of renting the theatre at $3,500 a month for 3 years which proposal would mean that the partnership would have made a certain profit (together with the rents obtained from the several properties) well in excess of the total profits made by the partnership for the years 1961 to 1963; (b) the partnership or the management had resolved to convert the partnership into a limited liability company and that the effect of such conversion would be a dissolution of the partnership. The appellants contended that in view of the above it was just and equitable to dissolve the partnership. In the court below the trial judge came to the conclusion that in the circumstances it was not just and equitable to order a dissolution under section 14(g) of the Partnership Ordinance. On appeal,

Held: (1) there were no reasons to alter the findings of the trial judge because it was not shown to the court that the judge had exercised his discretion on wrong principles or contrary to the evidence;

(2) there was no substance in the second contention because although the trial judge had not adverted to the point taken by counsel at the trial that failure was not material to his decision.

Observations on sections 14 and 24 of the Partnership Ordinance.

FEDERAL COURT.

George Seah Kim Seng for the appellants.

S. K. Reddi for the respondents.

Wee Chong Jin C.J. (Singapore) (delivering oral judgment): The appellants in this appeal are 6 out of 17 partners in a partnership business which owns a theatre and some offices which are let out at rent. The partnership runs this theatre at Sibu. The appellants being dissatisfied with the management of the partnership business, they being a minority as regards voting rights are concerned have commenced an action for the dissolution of this partnership.

The case for the appellants in the court below was based principally upon the fact that they being the minority and therefore not being able to influence the conduct or management of the business, the majority of the partners have so managed the partnership business as to make it just and equitable that the partnership be dissolved.

The appellants placed reliance on the fact that an offer was made by one of them to consider renting the theatre side of the partnership at a rent of $3,500 a month for a period of three years and they say that that proposal was not even considered by the management, meaning the respondents. They say that the effect of the proposal would mean that the partnership would make a certain profit together with the rents obtained from the several properties of a sum well in excess of the total profit, made by the partnership during the years 1961 and 1962 and part of the year 1963 and that the failure of the management to even consider this proposal in the circumstances would render it just and equitable for the partnership to be dissolved.

The other facts are that the cinema part of the business is managed by one of the defendants as a paid manager and that in so far as his employment was concerned he had not devoted his full time and attention to the business with the knowledge and approval of the other respondents by also becoming a partner of a firm (the Sarawak Film Company) which distributes films and as manager of the partnership business he rented from the other business, of which he is also a partner, films for the partnership theatre. That it is said is a factor which showed that this particular defendant has not devoted his full time and attention to his work and because of the knowledge of the other defendant partners that was a ground which should be considered under the just and equitable principle.

Another factor which should be taken into consideration according to the appellants was that at any rate the partnership or the management had resolved to convert the partnership into a limited liability company and that the effect of such conversion would be a dissolution of the partnership and that being the position it was just and equitable that the partnership should now be dissolved as asked for by the appellants. These I think are the three sets of facts so far as the trial was concerned.

The learned trial judge rejected, or having considered all the matters raised in evidence by the appellants, came to the conclusion that in his opinion in the circumstances it was not just and equitable to order a dissolution under section 14(g) of the Partnership Ordinance. He, in a thorough and full judgment, set out all the evidence presented at the trial and on the evidence he has come to the conclusion that it was not a justifiable case for dissolution by the court.

The only matter he did not deal with and I propose to deal with now is the point that the partnership would be converted into a limited liability company. It is admitted before us that the landed property which is a partnership asset is in the names of all the defendants and that no

steps could be taken to transfer this valuable asset of the partnership to the limited company without the consent and signatures of the appellants. But in so far as that point is concerned, although the trial judge has not adverted to that aspect of the matter, I think there is no substance in the point taken by counsel for the appellants before us that the trial judge failed to consider that and that failure was material in so far as his decision was concerned.

The real substance of the appeal on the facts is whether or not the fact that the partnership would, if the property of the theatre were rented out, get a certain profit for three years, that profit being admittedly on the face of it much more than the profits for 1961, 1962 and part of 1963 for the next three years make it such that it was just and equitable to order a dissolution. That was a question of fact. The only evidence before the trial judge was just this proposal and in my opinion he was justified in considering it as the actual rent and the actual period and the actual terms of the "offer" made to the partnership. He was not, as counsel for the appellants has urged us to do, obliged to pursue the matter further to see whether or not the management should have obtained more concrete or more substantial proposals from the first plaintiff who was the person named as the intending lessee. Taking the position as it was then, it is contended that it was not right of the respondents to allow the partnership business to continue operating a theatre for exhibiting films and it was suggested that the partnership should and ought to give up that business for a period of three years in exchange for a better margin of profit than would normally be expected if they continued to run the business. That the trial judge rejected and I see no reason to find that he had gone wrong in arriving at that view of the matter.

Now in so far as the principle of law on the just and equitable ground, the subsection itself makes it clear that it is a matter of discretion for the judge and unless it can be shown to us that the judge exercised his discretion on wrong principles or contrary to the evidence, speaking as an appellate court we are not entitled to interfere with the exercise of his judicial discretion. I find myself that he has not acted on any wrong principles and on the facts there is ample evidence to entitle him to come to the conclusion that it was not just and equitable to order a dissolution.

As regards the first ground of appeal namely that as the partnership agreement did not specify any fixed period, the appellants were entitled to have an order for dissolution as a matter of course so long as they wanted to dissolve the partnership, in my opinion section 14 and section 24 of the Partnership Ordinance does not, as contended by counsel for the appellants, give them that right. It is clear that under the Ordinance where there is no fixed period of time for the duration of the partnership a partner may retire from the firm at any time but there is no provision anywhere in the Ordinance, as there is in the English Partnership Act, whereby a partner may dissolve such a partnership by giving notice of his intention to dissolve it. We are urged to construe section 14 together with section 24 to give a partner a right to so dissolve a partnership. Section 14 merely gives the court power to dissolve a partnership at the suit of a partner on certain specific grounds and this section does not specify notice of dissolution as a ground. Section 24 merely provides for a winding up by the court after termination of a partnership or where a partner or his legal representative is entitled to claim a dissolution. The legislature has not provided for the dissolution of a partnership at will by the unilateral act of a partner but has specifically provided for a partner retiring from a partnership at will. For these reasons I would dismiss this appeal.

Wylie C.J. (Borneo): I agree that the appeal should be dismissed and that this court could not read into section 14 an entirely new ground for ordering the dissolution of a partnership. The proposed new ground would conflict with the provisions of section 11 and in the absence of any agreement to the contrary in the case of a partnership that thereby a partner may retire from it at any time would be quite contrary to section 14(d) even if, under the usual principles of construction it was open to the court to consider such a drastic implied term to section 14.

The other ground of appeal as argued before us, raises the consideration whether the judge was correct in deciding that it was not just and equitable that the partnership should be dissolved. He decided to this effect on a question the decision on which lay in the discretion of the court. It is not put forward before this court that he arrived at that conclusion on any wrong principle of law. It was merely argued that this court ought to take a different view of the facts from that taken by the learned trial judge. The Court of Appeal is invited to interfere with the finding of the trial judge on a pure question of fact. In any case, in my view, the judge arrived at a correct decision on the question of fact.

There is only one other matter I wish to refer to. I agree with counsel for the appellants that the trial judge did not deal with the question of forming a limited liability company. In other circumstances this might be a serious matter. However, it is conceded that in effect that proposition cannot proceed unless all the partners agree to it, because they are all registered as proprietors of the principal asset, the landed

property and it follows that the property cannot be taken from them without all of them signing the memorandum of transfer. That was a point which worried me to a certain extent, because, if the property could be transferred without the consent of any of the members of the partnership, creditors of the company could have come in between the partners and their hold on this piece of land, but counsel conceded that this could not happen and consequently I do not think the judge's omission to deal with this point is material. I agree that the appeal should be dismissed.

Tan Ah Tah F.J.: I also agree that this appeal should be dismissed. I wish to add that section 14 of the Partnership Ordinance cannot be construed, as counsel for the appellants attempted to do, as being applicable only to partnerships entered into for a fixed term.

Wylie C.J. (Borneo): The appeal is dismissed with costs.

Deposit to be paid to respondents or their advocates.

Appeal dismissed.

SAIGAL v. SAIGAL

[O.C.J. (Gill J.) June 20, 1964]

[K.L. — Divorce Suit No. 14 of 1963]

Husband and Wife — Divorce — Cruelty — Desertion — Condonation of cruelty by resumption of cohabitation — Revival by continued desertion.

The husband petitioned for divorce on the grounds of the wife's cruelty and desertion. It was found on the facts that the wife had been guilty of acts of cruelty to the husband but that subsequent thereto the husband had sexual intercourse with his wife. The wife deserted the husband on June 17, 1960, but between the period February 1962 to February 1963 there were acts of sexual intercourse between them. The wife continued to desert the husband after March, 1963.

Held: (1) by reason of the resumption of normal marital relations between the parties each act of cruelty alleged by the husband was condoned but it was revived by each subsequent act of cruelty;

(2) cruelty which has been condoned may be revived by subsequent desertion and therefore in this case the wife's cruelty was revived by her continued desertion.

Cases referred to:—

(1) *Perry* v. *Perry* [1952] P. 203.

(2) *Pizey* v. *Pizey and Stephenson* [1961] P. 101.

(3) *Benton* v. *Benton* [1958] P. 12.

(4) *Willan* v. *Willan* [1960] 2 All E.R. 463.

(5) *Beard* v. *Beard* [1946] P. 8.

SUIT FOR DIVORCE.

N. A. Marjoribanks for the petitioner.

A. Jayadeva for the respondent.

Cur. Adv. Vult.

Gill J.: This is a husband's petition for divorce on the grounds of his wife's cruelty and desertion. Both cruelty and desertion are denied by the wife who in turn charges the husband with cruelty and constructive desertion in that she was compelled by the petitioner's cruelty and conduct and the conduct of his parents and relatives to leave the matrimonial home, although she is not asking for any relief on those grounds.

The parties were married at the Marriage Registry in the District of Hendon in the County of Middlesex, England on 12th December, 1956, the petitioner being then 26 years old and the respondent 29. While in England they lived and cohabited first at 62 Ashbourne Avenue, London, N.W.11 and then at Fawlay Road, West Hampstead, London. Their first child, a daughter named Aruna, was born in London on 24th November, 1957.

Upon their return to Malaya the parties lived and cohabited in the husband's father's house at No. 10 Store Road, Kuala Lumpur from July 1958 and their second child, another daughter named Pushpa, was born on 2nd December, 1958. Soon after the birth of her second child the wife, with the husband's consent, went to live in Sungai Patani with her brother, who is a doctor in Government service, in order to recuperate her health. She returned to Kuala Lumpur in July 1959 and in September 1959 the parties moved into the husband's Railway Quarters at No. 1, Salak South.

In February 1960 the wife with her husband's agreement again went to live with her doctor brother in Sungai Patani, this time to see her mother and elder sister who had come from India on a visit. She was then about 7 months pregnant. In April 1960 she wrote to her husband to say that she wished to return to Kuala Lumpur for her confinement. The husband replied requesting her not to return as he was then appearing for an examination. He sent her a sum of $540 and she had her confinement in Sungai Patani where their third child, again a daughter named Sushita, was born on 23rd April, 1960.

At about this time the husband's father was seriously ill in Bungsar Hospital and he died on 8th June, 1960. On the same date the wife had sent a prepaid reply telegram saying "REPLY ONLY YES OR NO BEFORE 10 P.M. 8TH JUNE WHETHER YOU WANT ME BACK OR NOT DONT TELEPHONE".

The husband sent a reply telegram to say that his father had died. As a result of this telegram the wife came down to Kuala Lumpur with her children and her mother on 13th June, 1960. On the following day she left the house with her